IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

MADELINE BRAY GARRON,	)	No. 63421-6-I
Appellant,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
PIER POINT CONDOMINIUMS ASSOCIATION,	)	
	)	
Respondent.	)	FILED: July 27, 2009
	)	

Schindler, C.J. — Madeline Bray Garron appeals summary judgment dismissal of her personal injury lawsuit against the Pier Point Condominium Association (the Association) and the decision denying her motion to amend the complaint to sue individual condominium owners. While cleaning one of the condominium units, Garron slipped and fell on a wet tiled walkway. Garron claimed the Association owed her a common law duty of care as an invitee. The Association asserted that the duty of care the Association owed to Garron was as a licensee. In the alternative, the Association argued that even if Garron was an invitee, there was no evidence that the Association knew or should have known about the wet and slippery walkway. On summary judgment, the court ruled that as a matter of law Garron was a licensee, and

dismissed her lawsuit. Even if the Association owed Garron a duty as an invitee, because she did not carry her burden to present evidence that the Association knew or should have known that slippery and wet tiles on the walkway created a dangerous condition, we affirm summary judgment dismissal of the lawsuit against the Association. We also conclude that the trial court did not abuse its discretion in denying Garron's motion to amend the complaint to sue individual condominium owners.

FACTS

The Pier Point Condominium is a small eight unit condominium in Oak Harbor. The Association is a nonprofit corporation that manages and maintains the condominium and the condominium common areas. Eugene Lindbeck owned a condominium unit on the second floor. There is a covered exterior tiled walkway that leads from Lindbeck's unit down a stairway to the door of his garage. There is no dispute the walkway is a common area of the condominium.

Garron worked for Lindbeck as a housecleaner. Garron said that she cleaned Lindbeck's unit every week for several years. According to Garron, when it rained, the walkway titles were wet and slippery. Garron said that she slipped on the walkway tiles one other time but did not fall. Lindbeck also testified that he believed the walkway was dangerous when it rained, and that he told the Association's president that he was concerned about rain puddles on the walkway.

Lindbeck sold his condominium unit in 2004. After Lindbeck moved out,

Garron cleaned the unit. According to Garron, it was raining that day and she noticed that the walkway tiles were wet and slippery.

> Q. When you got there in the morning, was this walkway outside of the condo, was it wet and slippery?
> A. Yes.
> Q. You recognized that?
> A. Yes.

Garron said that on her way to Lindbeck's garage, she slipped on the tiles near the end of the walkway and fell down the stairs.

Garron sued the Association for personal injury damages. In her lawsuit, Garron alleged that the Association knew about the danger created by the wet tiles on the walkway but failed to make repairs.

Garron filed a motion for partial summary judgment, arguing that as a matter of law, the Association owed her a common law duty of care as an invitee.[1] The Association filed a motion for summary judgment arguing that it owed Garron a duty as a licensee, not as an invitee. The Association asserted that it was not liable to Garron as a licensee because she admitted knowing the tiles on the walkway were wet and slippery.[2] In the alternative, the Association argued that even if the Association owed Garron a duty as an invitee, there was no evidence that the Association knew or should have known about the alleged danger created by wet tiles on the walkway. In support, the Association relied on excerpts from the depositions of

[1] There is no dispute that Lindbeck owed Garron a duty of care as a business invitee.

[2] A possessor of land cannot be liable if the licensee knew about the condition and the risk. Memel v. Reimer, 85 Wn.2d 685, 538 P.2d 517 (1975) (citing Restatement (Second) of Torts § 342 (1965)).

Garron and Lindbeck.

In response to the Association's motion for summary judgment, Garron conceded that if the Association owed her a duty as a licensee, the Association was not liable. Garron presented no evidence in opposition to the Association's alternative argument. Before the hearing on the cross motions for summary judgment, Garron filed a motion to amend the complaint to sue each of the individual condominium owners except Lindbeck.

The trial court ruled that as a matter of law, the Association owed Garron a duty of care as a licensee and granted summary judgment in favor of the Association. The court denied Garron's motion to amend the complaint to sue the individual condominium owners.

ANALYSIS

Summary Judgment Dismissal

Garron contends the trial court erred in ruling that the Association owed her a duty of care as a licensee rather than as an invitee.[3] Assuming, without deciding, that the Association owed Garron a duty of care as an invitee, because she failed to carry her burden on summary judgment, we affirm dismissal of her lawsuit. LaMon v. Butler, 112 Wn.2d 193, 200, 770 P.2d 1027 (1989) (on appeal, the court can affirm summary judgment on any theory raised below that is supported by the pleadings and the

[3] An invitee is either a business invitee or a public invitee. Home v. North Kitsap School Dist., 92 Wn. App. 709, 717, 965 P.2d 1112 (1998). A business invitee is "a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land." Beebe v. Moses, 113 Wn. App. 464, 467, 54 P.3d 188 (2002). A public invitee must enter or remain on the property "as a member of the public for a purpose for which the land is held open to the public." Home, 92 Wn. App. at 717.

proof).

We review summary judgment de novo, engaging in the same inquiry as the trial court. Kruse v. Hemp, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993). The moving party bears the initial burden of showing the absence of an issue of material fact. Young v. Key Pharmaceuticals., Inc., 112 Wn.2d 216, 234, 770 P.2d 182 (1989); Seybold v. Neu, 105 Wn. App. 666, 677, 19 P.3d 1068 (2001). If the defendant shows there is no evidence to support the plaintiff's claim, the burden then shifts to the plaintiff to present evidence sufficient to show there are material facts in dispute. Atherton Condominium Apartment-Owners Ass'n Bd. of Directors. v. Blume Dev. Co., 115 Wn.2d 506, 515, 799 P.2d 250 (1990). If the plaintiff fails to carry its burden, summary judgment is properly granted because "'[t]here can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.'" Young, 112 Wn.2d at 225 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

To establish negligence, Garron had the burden to establish (1) the existence of a duty, (2) breach of that duty, (3) injury, and (4) a proximate cause between the breach and the injury. Tincani v. Inland Empire Zoological Soc'y, 124 Wn.2d 121, 127-28, 875 P.2d 621 (1994). The threshold question of whether a duty of care exists is a question of law. Tincani, 124 Wn.2d at 128.

In a premises liability action, the duty of care the possessor of property owes is

based on the common law classification of the person as an invitee, a licensee, or a trespasser. Tincani, 124 Wn.2d at 128. Assuming, without deciding, that the Association owed Garron a duty of care as an invitee, she failed to carry her burden on summary judgment to show there were disputed issues of material fact as to whether the Association knew or should have known of the alleged danger created by wet tiles on the walkway.

The Association is liable to an invitee for a dangerous condition of the common areas if the Association:

> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
> (c) fails to exercise reasonable care to protect them against the danger.

Restatement (Second) of Torts § 343 (1965); Iwai v. State, 129 Wn.2d 84, 93-94, 915 P.2d 1089 (1996). In applying the knowledge requirement, "Washington law requires plaintiffs to show the landowner had actual or constructive notice of the unsafe condition." Iwai, 129 Wn.2d at 96.

The Association asserted that even if it owed Garron a duty as an invitee, there was no evidence that the Association knew or should have known about the alleged danger created by the tiled walkway when it rained. In support, the Association relied on the uncontroverted testimony of Lindbeck and Garron.

Lindbeck testified that he talked to Association President Sue Karahalios about

the walkway one time. According to Lindbeck, Karahalios noticed that some tiles on the walkway needed to be replaced and told him that she would arrange to replace some tiles near his front door. Lindbeck testified that he told Karahalios that he was more concerned about puddles that collected on the walkway when it rained, than the appearance of the tiles.

> Q. Did you ever meet Sue Karahalios?
> A. . . . she came to the door and invited me to their quarterly meeting . . . [a]nd that's when she noticed the tiles that were -- had the finish missing on them and right in front of the front door and they were -- she said we would get those replaced, and she noticed my front door needed varnishing. The door was badly in need of something. And I talked to her and I told her, I said I wasn't really interested in the finish on the tile, that wasn't -- didn't really bother me, but what bothered me was the puddle, you know, the retention of water in the breezeway. And . . . I don't know whether she could do anything about it . . . We didn't have a lengthy conversation.

Although Lindbeck also testified that he thought the puddles were dangerous, he said that he did not express that concern to Karahalios. "No. I didn't tell her it was dangerous."

Lindbeck also testified that he mentioned one time in passing to the Association's treasurer Rhonda Haines-Pitt that there was a puddle in front of his door, but again, he did not tell her that the puddle created a dangerous condition.

> Q. Other than that conversation, did you ever have any other contact with any – with the homeowners association in which you informed the association that there was puddling on this walkway in front of your condo?
> A. I had mentioned it to Ms. Heins.
> Q. And when did you mention it to Ms. Heins?
> A. Oh, I -- it's just in passing. I think she walked by the garage when I was in there once, and I told her I was -- you know, I would like to have something done with that puddle in front of the breezeway. And

> she said, 'Well, I've got a puddle in front of my house too,' and we just went on with that, just a casual mention.
> Q. Did you ask her to have the association fix that?
> A. No.
> Q. Did you tell her it was a dangerous condition?
> A. No.

Garron unequivocally testified that she did not slip because of a puddle of water. Garron said that she slipped because the tiles on the walkway were wet.

> Q. Now, on the day of this accident, March 18th, was there a puddle on that walkway or was it just wet?
> A. It was wet.
> Q. So there was no puddle?
> A. I don't recall a standing puddle that day. The day before it, it had rained quite hard and there was standing water. But that day, I don't remember a standing puddle. It was more of a misty kind of rain blowing in. . . .
> Q. You did not slip in a puddle?
> A. No. I did not step in a puddle and slip. . . . I slipped on wet tile.

In response to the evidence presented by the Association in support of summary judgment, it is undisputed that Garron presented no evidence that the Association either knew or should have known of the alleged danger created by rain on the titled walkway. Because Garron failed to carry her burden, the Association was entitled to summary judgment dismissal.

Motion to Amend

Garron also claims that the trial court abused its discretion by denying her motion to amend the complaint to name seven individual condominium unit owners as defendants.[4] In the proposed amended complaint, Garron alleged that three members

[4] Garron sued all the condominium owners except Lindbeck.

of the Association failed to properly notify the Association of the hazardous walkway and the other Association members failed "to adequately supervise the conduct of the association in its duties for maintenance of the common areas." The trial court denied Garron's motion, ruling that the proposed amendment was likely futile under the case law and the Condominium Act, chapter 64.34 RCW.

We review a decision to deny the motion to amend the complaint for abuse of discretion. Wilson v. Horsley, 137 Wn.2d 500, 505, 974 P.2d 326 (1999). In deciding whether to grant a motion to amend, "[t]he court may consider the probable merit or futility of the amendments requested." Doyle v. Planned Parenthood of Seattle-King County, Inc., 31 Wn. App. 126, 131, 639 P.2d 240 (1982).

In denying Garron's motion to amend the complaint to sue the individual condominium owners as futile, the trial court relied on Faulkner v. Racquetwood Village Condominium Ass'n, 106 Wn. App. 483, 23 P.3d 1135 (2001). The trial court also cited a specific provision of the Condominium Act, RCW 64.34.344, that states "an action alleging a wrong done by the association must be brought against the association and not against any unit owner or any officer or director of the association."

In Faulkner, a condominium unit owner was attacked outside her unit. The attacker hid in an unlit common area near her unit in the condominium. Faulkner, 106 Wn. App. at 485. The owner sued the condominium association, the corporation the Association contracted with to manage the common areas, and the other owners of

the unit. Id. On appeal, this court held that the trial court properly dismissed the complaint against the individual condominium owners because they did not have "the right or the duty to control the common areas of the complex." Faulkner, 106 Wn. App. at 487.

Below and on appeal, Garron relies on Lake v. Woodcreek Homeowners Ass'n, 142 Wn. App. 356, 174 P.3d 1224 (2007), rev. granted, 165 Wn.2d 1012 (2009), to argue that the Condominium Act does not prevent her from suing the individual condominium owners. Lake is distinguishable. In Lake, a condominium unit owner sued the condominium association and another unit owner for specific performance of the condominium's building restrictions to prevent the owner from building a bonus room. Lake, 142 Wn. App at 366-67. Here, we conclude the trial court's decision denying Garron's motion to amend to sue the condominium owners was not an abuse of discretion.

Affirmed.

Schindler, C.J.

WE CONCUR:

Leach, J.

Grosse, J.